IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF THE STATE OF DELAWARE	§ § § §	No. 313, 2006	REC'D OFFICE OF SEP 27 2006 DISCIPLINARY COUNSEL

Submitted: August 15, 2006
Decided: September 22, 2006

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

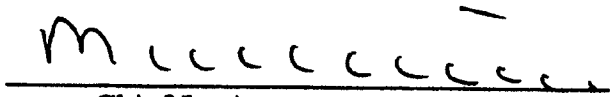
ORDER

This 22nd day of September 2006, it appears to the Court that the Board on Professional Responsibility filed its Report in this disciplinary matter recommending that the respondent-lawyer receive a private admonition for violating several of the Delaware Lawyers' Rules of Professional Conduct. Despite its recommendation of a private sanction in this case, the Board also recommended that its decision be made public in order to clarify for other members of the Delaware Bar a lawyer's responsibility to directly supervise the disbursement of funds from real estate transactions. Neither the ODC nor the respondent had any objections to the Board's Report and Recommendations. Accordingly, the Court directed the Board to file a public version of its Report redacting the name of the respondent. The Court has reviewed the matter pursuant to Rule 9(e)

and concludes that the Board's Report and Recommendations should be approved.

NOW, THEREFORE, IT IS ORDERED that the redacted Report of the Board on Professional Responsibility filed on August 15, 2006 (copy attached) is hereby APPROVED. The matter is hereby CLOSED.

BY THE COURT:



Chief Justice

THE BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a Member of the Bar of the Supreme Court of Delaware	) **CONFIDENTIAL**)) **Board Case No. 33, 2005**

REPORT OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

The Panel of the Board on Professional Responsibility appointed to hear this matter consisted of David J. Ferry, Jr., Esquire (Chair), Donald A. Blakey, Ph.D. and R. Brandon Jones, Esquire. A hearing was held in the Supreme Court Courtroom in Wilmington, Delaware on February 21, 2006. The Office of Disciplinary Counsel ("ODC") was represented by Mary S. Much, Esquire, who has subsequently been replaced by Andrea L. Rocanelli, Esquire and Respondent, ("respondent") was represented by Ian Connor Bifferato, Esquire, and Joseph R. Biden, III, Esquire. After the hearing, the Panel received submissions from both parties and an *amicus* memorandum of law from the Real and Personal Property Section of the Delaware State Bar Association.

BACKGROUND

A Petition for Discipline was filed against the respondent by the ODC on October 5, 2005. The Petition for Discipline alleged four counts charging the respondent with violations of Rule 1.4(b), Rule 1.16 Interpretive Guideline Re: Residential real estate transactions, Rule 5.3, and Rule 5.5(a), as follows:

COUNT ONE: Failure to Explain a Matter to the Extent Reasonably Necessary to Make an Informed Decision in violation of Rule 1.4(b).

COUNT TWO: Failure to Provide a Written Statement in violation of Rule 1.16

Interpretive Guideline Re: Residential real Estate transactions.

COUNT THREE: Responsibilities Regarding Non-Lawyer Assistants in violation of Rule 5.3.

COUNT FOUR: Assisting in the Unauthorized Practice of Law in violation of Rule 5.5(a).

Respondent filed an answer to the petition and denied all four counts of the petition and requested that the petition be dismissed.

FACTS AND EVIDENCE PRESENTED AT THE HEARING

The ODC's opening statement to the Board indicated that the issue in this matter was whether a lawyer can permit disbursement of real estate proceeds through a third party, that is, a title company. The ODC submitted that when Delaware attorneys delegate this function to an outside party, there is no way for the attorney to supervise the matter and they can, therefore, not protect the public. The ODC indicated its intention to call Edward Tarlov, Esquire and Michelle Nadeau to testify.

Respondent's counsel acknowledged that the ODC has the ability to protect the public by seeking redress against members of the bar, but in this case argued that the respondent complied with all but one issue which was that the attorney must have in writing a document that confirms the client's right to choose their counsel. In their opening comments to the Board, respondent's counsel indicated that an attorney must have in writing a document that expressly presents to his client that client's right to have separate counsel and that respondent would testify that he believes he, in fact, did present his client with the right to separate counsel and explained that right, but admitted that he did not have a written document to present at the hearing. Respondent's counsel, therefore,

indicated that was one area in which respondent does not contest the ODC's complaint.

The ODC clarified that it was asking the Board to make findings of fact that the respondent's failure to provide his client with a writing outlining her absolute right to retain an attorney of her choice to represent her in the real estate transaction and then charging a fee for his services was in violation of Rule 1.16, Interpretative Guideline Re: Residential real estate transactions. The ODC further confirmed that this matter has been brought to clarify an existing ruling of court in the matter of Mid-Atlantic Settlement Services, Inc., et al. – Board of the Unauthorized Practice of Law case (2000 WL 97-5062 Del.Supr.) ("Mid-Atlantic"). A copy of the Mid-Atlantic decision was attached to the Petition for Discipline.

The ODC's first witness, Edward Tarlov, testified that he has been a practicing Delaware attorney for twenty years and is the chair of the Real and Personal Property Section of the Delaware State Bar Association. His business consists strictly of real estate transactions with the majority of his practice handling residential real estate transactions.

Mr. Tarlov indicated that when he receives a referral to represent a buyer, he sends a Rule 1.16 conflict letter out to the buyer. The conflict letter insures that the buyer is aware that they have an absolute right to choose any attorney. Mr. Tarlov explained the process of representing a client in a real estate transaction. He confirmed that to ensure that the funds are in his account, someone in his office pulls up the account using a computer program and ensures that the funds were issued on a certified check. Mr. Tarlov and his CPA review accounts to ensure that they are reconciled. He indicated that he uses settlement software to write the checks for settlements and an attorney in his office is required to sign the checks. Mr. Tarlov does not believe that funds in the case involving

the respondent would have "bounced" if they came from the attorney escrow account.

Mr. Tarlov's belief is that the Mid-Atlantic case requires that a Delaware lawyer perform real estate transactions for the transfer of property and refinancing. One of the protections to the client having a lawyer perform the settlement includes a required compliance whereby the bank that has the escrow account must notify the Supreme Court if there are insufficient funds in the account. He believes the Mid-Atlantic decision requires that all funds flow through the real estate firm's escrow account if the attorney is the settlement agent.

Respondent's client, Michelle Nadeau (formerly Michelle Flanders), also testified in this matter. She indicated that she decided to refinance her home in January of 2003 and contacted First Central Mortgage after receiving a mailing from them. Ms. Nadeau first learned of the respondent's involvement with the refinance after the mortgage broker at First Central Mortgage informed her that he would be the attorney who would be conducting the real estate refinancing settlement. Respondent's office contacted Ms. Nadeau about a week prior to the September 22, 2003 settlement. Ms. Nadeau testified she did not receive anything from respondent's office regarding her absolute right to retain any attorney. She also testified that she was unaware that the funds from the settlement would be coming to her from Advance Settlement Services ("Advance"). She believed that she would receive funds from respondent's office. She did not discuss who would be disbursing the funds with respondent or First Central Mortgage. She knew the funds would not be disbursed until after the three day recision period required under refinancing transactions. She did not believe the respondent thoroughly reviewed all of the mortgage documents with her although she agreed that she signed all of the documents. She did

not recall asking respondent to change the credit cards that were to be paid from the refinance.

Ms. Nadeau received three disbursement checks in the mail. The checks were issued on September 26, 2003 by Advance Settlement Agency. She received a check for $9,114.00 payable to MBNA, a check for $8,732.00 payable to CitiBank, and a check for $1,994.06 payable to herself. She understood that the $1,194.06 check was to go into an escrow account for her taxes and insurance after she made her first payment. She testified the CitiBank check was immediately mailed to CitiBank and cashed. She testified the other checks were not cashed because she was out of town immediately following the arrival of the checks. When she returned, she mailed the MBNA check, but it did not clear because the account on which the check was written had been closed.

Ms. Nadeau tried to contact respondent and First Central Mortgage, but received little to no assistance. She eventually contacted the Delaware State Police. Based on their efforts, Dwayne Pope of Advance Settlement Agency is currently incarcerated in Pennsylvania. Ms. Nadeau and respondent have been in contact with the title insurance company. Respondent told Ms. Nadeau that he would not be able to recover her funds because it is an unsecured debt. Respondent assisted Ms. Nadeau in filing a complaint with the Pennsylvania Board for Client Protection. That board informed her that Mr. Pope had never been a licensed attorney in Pennsylvania and, therefore, they could not give her any relief. She has not filed a claim with the Delaware Lawyers Fund for Protection because the Attorney General's Office advised her that she should contact the police. Ms. Nadeau paid off her MBNA account in September of 2005 with money from her late father's estate. She subsequently sold the house that she refinanced because of her debt

and her inability to obtain any more equity from the home.

A law clerk in respondent's office testified on behalf of respondent. The law clerk is a member of the Delaware, New Jersey and New York Bars. Since September of 2005, he has handled residential real estate settlements in Delaware. He was present at the refinancing settlement of Ms. Nadeau to fulfill his Delaware clerkship requirements. He arrived to the settlement late and noticed about half of the documents had already been signed. Upon his arrival, respondent stopped the proceedings and explained the documents to him that had already been discussed and signed by Ms. Nadeau. The respondent also went over the general procedures of a refinancing settlement.

The law clerk stated that he believed that Ms. Nadeau was rushing through the settlement and signing the documents in a hurried manner. He testified that respondent was trying to explain the documents to Ms. Nadeau, but she seemed to have little interest in what he was saying to her. The entire process took fifteen to twenty minutes from the time the law clerk entered the room to the end of the settlement conference. He believes that he entered the room approximately half-way through the completion of the settlement and that it normally takes thirty to forty minutes to complete a settlement.

Respondent testified that he was admitted to practice in Delaware in 1994. He presently works as a solo practitioner primarily in the area of real estate law. He is a member of the Real and Personal Property Section of the Delaware State Bar Association, has been performing real estate closings on his own for the past ten years, and in his cases he has disbursed funds from his attorney escrow account as well as through third party accounts.

Respondent was first contacted about Ms. Nadeau's settlement in the summer of

2003. He was asked to prepare a new deed for the property that would remove Ms. Nadeau's ex-husband from the title. He receives referral cases much the same way as other members of the Bar. He testified that Advance is the title company that contacted him and First Central Mortgage was the mortgage broker.

Respondent indicated that he received referrals from Advance on a regular basis. He never disbursed funds from his escrow account when he worked with Advance. His relationship with Advance occurred in 2002 and 2003. He has not had any other cases that involved a theft by a third party. He testified that Advance Title Company and Advance Settlement Agency were both title companies. Advance performed closings in Pennsylvania, but does not perform closings in Delaware. In this case, Advance Title Company through their title company, Stewart Title, submitted a closing protection letter ("CPL") to the lender. The purpose of the CPL is to protect the bank in the case of misuse or fraud of the funds from Advance Title. Respondent believed that the CPL protected the borrower as well as the lender because the lender issued a commitment letter to the borrower. The bank is protected by the CPL from the title company and, in turn, the borrower is protected by the commitment letter from the bank. The complication arose in this case because the CPL was issued by Stewart Title Company and the title binder was issued by Security Title. Respondent does not know why two title companies were used in this case, but the result was that the two title companies lay blame on each other. Respondent is under the assumption that the title company is required to make the borrower whole in a case of misappropriation of funds by their closing agent pursuant to the terms of the CPL.

Respondent testified as to the process in handling the settlement. He testified that

he asked Ms. Nadeau if it was acceptable for the law clerk to sit in on the closing. The respondent stated that he included as part of his regular practice a Supreme Court conflict notice that puts the borrower on notice of their absolute ability to retain counsel of their choosing at the time of closing; however, he cannot produce the conflict letter that he states Ms. Nadeau signed. He indicated his practice at the time was to have borrowers sign the Supreme Court letter at the time of closing.

Respondent spoke with Ms. Nadeau about Advance's role in the refinance. Their discussion arose regarding Ms. Nadeau's request to change some of the refinance disbursements. Respondent said he made it clear Ms. Nadeau's disbursements would come from Advance. The disbursement sheet from the settlement indicates that respondent was in contact with Advance regarding changes to Ms. Nadeau's disbursements. He never mentioned that the payments would be coming from his escrow account.

Respondent became aware of the problems with the checks when a check written to him for his work on Ms. Nadeau's case bounced. He spoke with Ms. Nadeau in October regarding her MBNA check. That check had bounced because Stewart Title obtained an injunction against Dwayne Pope's real estate escrow account due to his fraud. Respondent was not able to collect his fee in this case. He spoke to Ms. Nadeau about remedying the problem. He contacted the title company and recommended that she file a claim with the Lawyer's Fund for Client Protection in Pennsylvania. Respondent was under the impression that Mr. Pope was a Pennsylvania attorney, but he was not.

Respondent testified that he stays current in real estate law through his membership in the Real and Personal Property Section of the Bar and discussions with other attorneys.

He became aware of the Mid-Atlantic decision around a year after it was issued. He did not receive any indication that real estate rules had changed as a result of the Mid-Atlantic decision. He testified no one contacted him about ceasing to do third party closings. He testified there are a number of other attorneys that allow third parties to disburse funds. Respondent believes he is able to oversee the disbursement of funds because a third party cannot disburse funds without his approval. When a settlement occurs, respondent gives the title company a signed settlement sheet with notes on post-closing disbursement issues. Respondent only inquires about the disbursement if there is a delay or if the borrower inquires as to why funds have not been disbursed. Respondent did not receive a call that Ms. Nadeau's funds had been disbursed nor did he contact Advance to be sure that the lender had sent the funds to Advance. Respondent does not receive copies of checks that are sent to the borrower.

Respondent testified that he is protected from a stop payment on a check written from his escrow account because of the commitment letter from the bank. A borrower in a third party case is protected because of the CPL. A lender will not release funds until they receive the CPL. A title company has the right to audit an attorney's books to see if they have any stale checks in violation of the Delaware rules.

Respondent testified he has not personally reviewed any of Advance's records, but LandAmerica, a title agency, reviewed their agent's reconciliations and bank accounts to insure that there were no stale checks. Respondent believes Mr. Pope's business was shut down because Stewart Title discovered that there were problems with the accounts. Respondent is not aware of the details of Mr. Pope's criminal case. He was not aware that Mr. Pope had pled guilty to charges of conspiracy.

Respondent testified he is ultimately responsible for reviewing all paperwork that is completed in his office. He engages in monthly reconciliations of his account required by Rule 1.15. He realizes that if a check bounced in his account, a notice would be sent to the ODC. Respondent believes the title insurance company that issued the CPL is responsible to make sure that the funds are good funds and, therefore, would be responsible for paying Ms. Nadeau's claim. He believes Ms. Nadeau is protected by the CPL because of the lender's commitment letter. Respondent believes that the Real and Personal Property Section of the Bar Association should provide a bright line rule for the Mid-Atlantic case and how that case affects real estate closings.

The ODC submitted one exhibit which spelled out the traditional role of Delaware attorneys in transactions involving Delaware real property. Respondent submitted ten exhibits as follows:

Respondent's Exhibit 1 was a letter from Advance Settlement Agency to the attorney's office dated 8/22/03 directing that a new deed be prepared removing Dean Flanders from the title;

Respondent's Exhibit 2 was not admitted;

Respondent's Exhibit 3 was an addendum to note signed by Ms. Nadeau on 9/22/03;

Respondent's Exhibit 4 was a copy of the HUD-1 Settlement Statement dated 9/22/03;

Respondent's Exhibit 5 was a signed copy of the HUD-1 Settlement Sheet dated 9/22/03;

Respondent's Exhibit 6 was a document copy policy/receipt acknowledgment signed by Ms. Nadeau on 9/22/03;

Respondent's Exhibit 7 was a note from respondent to Dennis regarding Ms. Nadeau's questions about pay-offs and escrows in her monthly payment;

Respondent's Exhibit 8 was a closing service letter dated 9/5/03;

Respondent's Exhibit 9 was a fax confirmation dated 9/5/03 for the closing service letter dated 9/5/03;

Respondent's Exhibit 10 was an unsigned document titled "In anticipation of your upcoming purchase or refinance, the following is the required Delaware Supreme Court conflict notice".

ANALYSIS, FINDINGS AND DECISION

As framed by the ODC in its opening statement to the Board, the question presented is whether it is a breach of professional responsibility for a Delaware attorney performing a real estate settlement to permit a non-licensed party to be responsible for the disbursement of settlement funds in connection with the real estate settlement.

It is clear that respondent has failed to provide a written statement in violation of Rule 1.16 Interpretive Guideline Re: Residential real estate transactions as the respondent was unable to produce a signed copy of the document at the hearing. In addition, respondent testified that it was his practice in 2003 to have a borrower sign such a document at the settlement table. This practice violated Rule 1.16 Interpretive Guideline as the written disclosure, even if it was provided, was not provided in writing at the earliest practicable time as required by Rule 1.16(a).

The more difficult question is whether respondent committed other ethical violations in allowing Advance to act as the disbursing agent for the refinancing proceeds. The Board has concluded that the respondent has committed a violation of Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistants – because by allowing Advance to disburse the settlement funds, the respondent could not properly supervise the disbursement of funds and comply with the requirements, accountability, and oversight embodied in Rule 1.15 and

Rule 1.15(A) of the Delaware Lawyers Rules of Professional Conduct.

It would also appear to be a violation of Rule 5.5(a) – Assisting in the Unauthorized Practice of Law – to permit a non-licensed party (the title company) to receive and be responsible for the disbursement of loan proceeds in a real estate settlement.

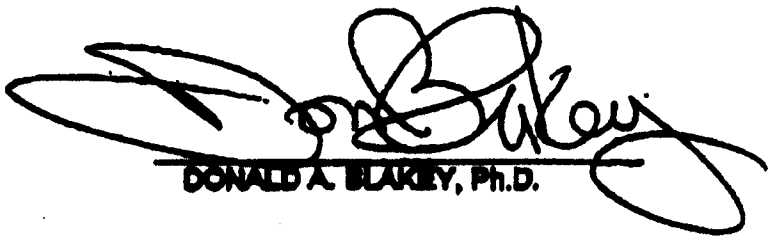
The latest expression of what constitutes the practice of law in connection with real estate settlements is found in the Mid-Atlantic decision. In Mid-Atlantic, the Board held that real estate settlements constitute the practice of law and, therefore, it was necessary for settlements to be held by a Delaware attorney. The Board set forth aspects of a real estate settlement that constituted the practice of law which, among other things, included "supervising the disbursement of funds" . . .

Although the Board's decision in Mid-Atlantic did not specifically address what supervising the disbursement of funds entailed, it is clear from the decision that the Board wished to provide clients with the benefit and protection of the control and oversight of the Delaware Supreme Court. The accountability and oversight was later embodied in Rule 1.15 and Rule 1.15(A) of the Delaware Lawyers Rules of Professional Conduct. These procedures, among other things, require an attorney to keep funds separate from his own property, to maintain funds in a separate trust or escrow account, to reconcile the account monthly, and to allow those accounts to be subject to examination by the auditor for the Lawyers Fund for Client Protection. The rules also govern trust account overdraft notification. With respect to trust or escrow accounts maintained pursuant to the rules, the ODC is provided notice if a trust or escrow account has insufficient funds. This allows for immediate response by the ODC if a situation such as the one that occurred here had arisen.

The protections afforded under Rules 1.15 and 1.15(A) will be rendered meaningless if a Delaware attorney could obviate responsibility under the rules by permitting non-licensed persons or entities to control the disbursement of funds in a real estate settlement. The Board concludes that a Delaware attorney who permits a non-licensed party to receive and control the disbursement of loan proceeds on behalf of a real estate client has violated the responsibilities regarding non-lawyer assistants pursuant to Rule 5.3 and has assisted in the unauthorized practice of law in violation of Rule 5.5(a).

RECOMMENDATIONS

In light of the fact that respondent's case appears basically to be a test case to obtain clarification of the Mid-Atlantic decision and the respondent appears to have no improper motive in his handling of this matter, it is the recommendation of the Board that respondent receive a private reprimand for his violation of Rule 1.16 Interpretive Guideline Re: residential real estate transactions, Rule 5.3 and Rule 5.5(a), and that the Court make public its determination and ruling that attorneys must directly supervise the disbursement of funds from real estate transactions and do so only through Rule 1.15(A) trust accounts in the future.



DONALD A. BLAKEY, Ph.D.

R. BRANDON JONES

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